

Donald E. J. Kilmer, Jr. [SBN: 179986]
 LAW OFFICES OF DONALD KILMER
 1645 Willow Street, Suite 150
 San Jose, California 95125
 Voice: (408) 264-8489
 Fax: (408) 264-8487
 E-Mail: Don@DKLawOffice.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO / OAKLAND DIVISION

MARK AARON HAYNIE, THE
 CALGUNS FOUNDATION, INC.,
 and THE SECOND AMENDMENT
 FOUNDATION, INC.,

Plaintiffs,

vs.

KAMALA HARRIS, Attorney General
 of California (in her official capacity)
 and CALIFORNIA DEPARTMENT
 OF JUSTICE, and DOES 1 TO 20,

Defendants.

Case No.: CV 10 1255 SI

**PLAINTIFFS' OPPOSITION TO
 MOTION TO DISMISS**

Date: June 10, 2011

Time: 9:00 a.m.

Courtroom: 10

Judge: Honorable Susan Illston

Trial Date: N/A

Action Filed: March 25, 2010

Introduction | Preliminary Statement

This is a case about a state agency that wants to have its cake and eat it too. The California Department of Justice (DOJ), at least for purposes of this motion, admits that semi-automatic rifles with properly installed "bullet buttons" and magazine locks, are legal to own in California.

But as set forth in the concurrently filed declaration by the Chairman the CALGUNS FOUNDATION, INC., the Court will see that the DOJ has been simultaneously advising residents of California that their possession of certain

1 semi-automatic firearms is legal, while at the same time warning them that any
 2 one of the 58 of the State's District Attorneys might come to a different conclusion
 3 and prosecute them for ownership/possession of these same firearms.

4 In light of Supreme Court's opinions in *District of Columbia v. Heller*, 554
 5 U.S. 570 (2008) and *McDonald v. City of Chicago*, 177 L. Ed. 2d 894 (2010) that
 6 there is a Second Amendment right to acquire, own, possess and use common and
 7 ordinary firearms for lawful purposes including, but not limited to self-defense, the
 8 DOJ's actions on this issue are a text book definition of the chilling of a
 9 fundamental right.

10 Finally, while not part of this case¹, Plaintiffs would aver that if the law is so
 11 confusing that 59 prosecutors with the duty and discretion to file criminal charges
 12 against otherwise law-abiding people for mere possession of a firearm – can't agree
 13 on the what makes a gun legal or illegal, then there are only two conclusions:

- 14 1. The agency benefits from the confusion in some way, or
- 15 2. The law itself is unconstitutionally vague.

16 Statement of Facts

- 17 1. For the reasons set forth below, this Court is required to accept as true all
 18 material allegations of the complaint and construe the facts in the light most
 19 favorable to the Plaintiffs. That makes the First Amended Complaint (FAC)
 20 itself the Statement of Facts for this memorandum.
- 21 2. However, the Plaintiffs wish to make some additional facts available to the
 22 court, that if not dispositive, would support leave to amend the FAC.
- 23 3. Filed concurrently with this memorandum is the DECLARATION OF GENE
 24 HOFFMAN OPPOSING DEFENDANTS' MOTION TO DISMISS. What
 25 becomes abundantly clear from the recitation of undisputable facts set forth
 26 in Mr. Hoffman's declaration is that Defendant CALIFORNIA

28 ¹ Though this theory is plead in a related action that is being concurrently filed.

1 DEPARTMENT OF JUSTICE (DOJ) comes to this suit, and pleads their
2 defense with unclean hands.

3 4. A fair interpretation of the events described by Mr. Hoffman, with all
4 inferences favorably disposed toward the Plaintiffs, are:

5 a. The DOJ treats gun owners in California as legal guinea-pigs when it
6 comes to their statutory duty of interpreting the Assault Weapons
7 Statutes and Regulations.

8 i. What other explanation is there for the DOJ's lawyer (Ms.
9 Allison Merrilees) advising people that their guns are legal, but
10 watch out for the 58 D.A.s in this state, as they might disagree
11 and prosecute you? (Exhibit A attached to Hoffman Declaration.)

12 ii. Compound that with Ms. Merrilees admission, while she was a
13 DOJ lawyer, that DOJ was looking for a test case to define
14 detachable magazine. (Exhibit C attached to Hoffman
15 Declaration.) The implication of this one fact alone is that DOJ
16 was prepared to heap the full prosecutorial power of the state
17 upon an individual, including the deprivation of liberty, the
18 disruption to careers and families and costs imposed for criminal
19 defense – as a means of redeeming a highly technical (and
20 constitutionally dubious) scheme of regulating common and
21 ordinary firearms.

22 b. That the DOJ intentionally put out a disinformation campaign by
23 falsely telling the public that temporary modifications of a firearm that
24 prevent it from accepting a detachable magazine still results in
25 firearm that can be classified as an assault weapon. (i.e., that
26 permanent modification of the gun is required.) (See Exhibit D
27 attached to Hoffman Declaration.)

28 c. Following up the disinformation campaign, the DOJ had to try and

1 follow through with an attempt at rule-making that never got off the
 2 ground. (Exhibits E and F attached to the Hoffman Declaration.) In
 3 other words, DOJ's attempt to clarify the law through its rule-making
 4 power is an admission that law hadn't caught up with the technology
 5 and that (then) current regulations weren't adequate to address the
 6 issue of detachable magazines, at least from DOJ's perspective.

7 d. Not satisfied with following the Administrative Code of California for
 8 clarifying the law, DOJ took a run at promulgating an underground
 9 regulation. (Exhibits G, H, I and J attached to Hoffman Declaration.)

10 e. Even a direct plea from one of the 58 District Attorneys for advice on
 11 interpreting California's Assault Weapons law is rebuffed by DOJ.
 12 (Exhibit K attached to Hoffman Declaration.)

13 f. Finally, to dispel the assumption that Plaintiff HAYNIE's experience is
 14 an isolated incident, Mr. Hoffman recounts a half-dozen cases, related
 15 to bullet buttons or magazine locks, in which CALGUNS
 16 FOUNDATION INC., assisted in the defense of people wrongfully
 17 accused of possessing legal firearms. (Hoffman Declaration ¶20.)

18 g. The full story of Mr. Brendan Richards is detailed in his own
 19 Complaint for civil rights violations, a case filed on or about May 20,
 20 2011 in which a notice of related case will also be filed. Basically:

- 21 i. Mr. Richards was arrested and spent 6 days in jail before his
 22 family could raise the funds for bail.
- 23 ii. He was charged, based on a police officer's report who claimed to
 24 be an expert in firearms, with felony possession of assault
 25 weapons and large capacity magazines.
- 26 iii. After the DOJ's own expert submitted a report that the firearms
 27 were in fact legal to own in CA, all of the charges against Mr.
 28 Richards were dismissed.

Legal Standards Re: Fed.R.Civ.P. 12(b)(1) Motions

5. Defendants' Rule 12(b)(1) subject matter jurisdiction challenge appears to be based solely on constitutional/procedural rules regarding standing and prudential considerations of abstention and/or exhaustion of administrative remedies. Courts disagree whether a motion to dismiss for lack of standing should be brought under Rule 12(b)(6) or 12(b)(1).

- a. Some courts (including the Ninth Circuit) hold a motion to dismiss for failure to state a claim under Rule 12(b)(6) lies where the complaint reveals on its face that plaintiff lacks standing. *Sacks v. Office of Foreign Assets Control* (9th Cir. 2006) 466 F.3d 764, 771; *Brereton v. Bountiful City Corp.* (10th Cir. 2006) 434 F.3d 1213, 1216; *Ballentine v. United States* (3rd Cir. 2007) 486 F.3d 806, 810.
- b. Other courts hold such motions should be brought under Rule 12(b)(1) because standing is a jurisdictional matter. *Alliance For Environmental Renewal, Inc. v. Pyramid Crossgates Co.* (2nd Cir. 2006) 436 F.3d 82, 88, fn. 6; see *Stalley ex rel. United States v. Orlando Regional Healthcare System, Inc.* (11th Cir. 2008) 524 F.3d 1229, 1232 – dismissal for lack of standing treated as dismissal for lack of subject matter jurisdiction under FRCP Rule 12(b)(1); *Apex Digital, Inc. v. Sears, Roebuck & Co.* (7th Cir. 2009) 572 F.3d 440, 443.

6. Furthermore, under a Rule 12(b)(1) jurisdictional motion a defendant may make either: (1) a facial attack, which requires the court to accept the facts plead in the complaint as true, or (2) a factual attack (i.e., a speaking motion) based on extrinsic evidence. Moreover, if the jurisdictional facts are intertwined with substantive issues, then the Court should deny a request for dismissal under Fed.R.Civ.P. 12(b)(1) and adjudicate the issue under Rule 12(b)(6) and/or Rule 56. See: *Safe Air for Everyone v. Meyer* (9th Cir. 2004) 373 F.3d 1045, 1039. This is not an insignificant issue.

7. A Rule 12(b)(6) motion based on extrinsic facts cannot be granted where there is a genuine issue as to any material fact. However, a Rule 12(b)(1) "speaking motion" may be granted notwithstanding disputed facts because the trial court has power to evaluate and decide conflicting facts in an evidentiary hearing and weigh competing evidence. *Rosales v. United States* (9th Cir. 1987) 824 F.2d 799, 803.
8. This threshold issue is easily resolved as the Defendants have not tendered any extrinsic evidence (e.g., requests for judicial notice, certified documents, affidavits, etc...) in support of a 'speaking motion' under Rule 12(b)(1); therefore the Court is required to adjudicate this motion under the rules and standards of Fed.R.Civ.P. 12(b)(6), i.e., the Court must consider the allegations in the complaint as true and construe them in the light most favorable to the Plaintiffs. *Montez v. Department of Navy* (5th Cir. 2004) 392 F.3d 147, 149-150; *Safe Air for Everyone v. Meyer* (9th Cir. 2004) 373 F.3d 1035, 1039.

Legal Standards Re: Fed.R.Civ.P. 12(b)(6) Motions

9. Since the Defendants have elected, under Fed.R.Civ.P. 12(b)(6), to challenge jurisdiction and the legal sufficiency of the complaint, the court must decide whether the facts alleged, if true, would entitle plaintiff to some form of legal remedy. Unless the answer is unequivocally "no," the motion must be denied. *Conley v. Gibson* (1957) 355 U.S. 41, 45-46, 78 S.Ct. 99, 102; *De La Cruz v. Tormey* (9th Cir. 1978) 582 F.2d 45, 48; *SEC v. Cross Fin'l Services, Inc.* (CD CA 1995) 908 F.Supp. 718, 726-727 (quoting text); *Beliveau v. Caras* (CD CA 1995) 873 F.Supp. 1393, 1395 (citing text); *United States v. White* (CD CA 1995) 893 F.Supp. 1423, 1428 (citing text).
10. Thus, a Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.* (9th Cir. 1990) 901

1 F.2d 696, 699; *Graehling v. Village of Lombard, Ill.* (7th Cir. 1995) 58 F.3d
 2 295, 297 – "A suit should not be dismissed if it is possible to hypothesize
 3 facts, consistent with the complaint, that would make out a claim"; *Hearn v.*
 4 *R.J. Reynolds Tobacco Co.* (D AZ 2003) 279 F.Supp.2d 1096, 1101 (citing
 5 text); *Coffin v. Safeway, Inc.* (D AZ 2004) 323 F.Supp.2d 997, 1000 (citing
 6 text).

7 Discussion | Argument

8 A. This Court has Federal Question Jurisdiction.

- 9 11. Vindication of civil rights under the Constitution is certainly a federal
 10 question. 28 U.S.C. § 1343. Since the Plaintiffs are essentially complaining
 11 that their "right to keep and bear arms" as defined by the Second
 12 Amendment is being chilled, their claims certainly qualify as a federal
 13 question. See: *District of Columbia v. Heller*, 554 U.S. 570 (2008) and
 14 *McDonald v. City of Chicago*, 177 L. Ed. 2d 894 (2010).
- 15 12. The allegations in the complaint are that Plaintiff HAYNIE was wrongfully
 16 deprived of his liberty, in part, because the DOJ has failed in its statutory
 17 duty to clarify the law on so-called Assault Weapons. And while the City of
 18 Pleasanton has graciously settled the financial loss by reimbursing his bail
 19 fee, the physical fact remains that HAYNIE had his Fourth Amendment right
 20 to be free of unreasonable seizure (both his person and his rifle) violated.
- 21 13. The DOJ's attempt to characterize this event as an isolated incident is belied
 22 by the multiple cases documented in the Hoffman Declaration which supports
 23 ¶ 24 (page 5) of the First Amended Complaint (FAC). The facts are, that
 24 otherwise law-abiding gun owners continue to be arrested and have their
 25 firearms confiscated due to the general state of confusion in the law
 26 enforcement community about the definition of detachable magazines.
 27 Therefore it is not unreasonable for HAYNIE on behalf of himself, and for the
 28 CALGUNS FOUNDATION, INC., and the SECOND AMENDMENT

FOUNDATION, INC., on behalf of their members, to assert that there is a real threat of future illegal seizures based upon the policy decision by DOJ to refuse to clarify the definition of detachable magazine. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

14. The same argument is applicable in a Second Amendment context for as long as law enforcement agencies in this State continue to confiscate legal firearms from people who have committed no crimes.

B. Chilling the Exercise of a Fundamental Right is Irreparable Harm.

15. Evolving case law on the Second Amendment is trending toward treating it, in some respects, like the First Amendment. *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010); *Heller v. District of Columbia*, 698 F. Supp. 2d 179 (D.D.C. 2010), *United States v. Engstrum*, 609 F. Supp. 2d 1227 (D. Utah 2009).

16. Vague and overbroad laws are subject to constitutional censure if they chill the exercise of a fundamental right. Additionally, quite apart from any ‘substantive due process’ claim, enumerated rights provide a particular bulwark against laws that criminalize conduct that cannot be adequately defined in a way to prevent wrongful prosecutions. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Reno v. ACLU*, 521 U.S. 844 (1997).

17. On page 8 of their Motion to Dismiss (MTD), Defendants conceded that HAYNIE’s arrest was wrongful and appeared to stem from human error on the part of the Pleasanton Police officer. Thus DOJ contends that there is no pervasive confusion in the law enforcement community about Assault Weapon definitions. But the FAC at ¶ 24 and the Hoffman Declaration raise a triable issue of fact whether this is true.

18. Gun owners in California should not have to bear the burden of uncertainty caused by laws with vague and ambiguous definitions, especially when the DOJ has the power, at such minimal effort, to remove that ambiguity.

C. There are Four Separate Theories for Injunctive Relief.

19. First, the FAC invokes California Penal Code §§ 12276.5 and 12289 for the proposition that the DOJ and Attorney General have a duty to “adopt rules and regulations that may be necessary or proper to carry out the purposes and intent of this chapter.” PC § 12276.5(c). Similarly the DOJ has duty to educate the public, and engage in outreach to local law enforcement to insure compliance with the law. PC § 12289(a). Both of these statutes speak in the compelling language of “The Department of Justice shall....” or “The Attorney General shall...” But as the MTD points out the Attorney General is the chief law officer of the State, with a duty see that the laws of California are uniformly and adequately enforced. To accomplish this the Attorney General has supervisory authority over all 58 District Attorneys. Cal. Const., Art. V, § 13 *et seq.* So how is that Ms. Merrilees can opine that a gun is legal to import into California, but that 58 D.A.s might disagree with her? There has to be remedy for compelling the states “chief law officer” to comply with the law (and her own state constitution) and that mechanism is the injunctive relief available under 42 U.S.C. § 1983, 1988 in a federal court.
20. Second, notwithstanding the specific duties of the Attorney General and the Department of Justice with respect to Assault Weapons, the Defendants have a general duty under California Penal Code §§ 13500 *et seq.*, which establishes a commission on Peace Officer Standards and Training that requires the DEPARTMENT OF JUSTICE, with the Attorney General as an ex officio member of the commission, that is required to provide personnel, training and training material to cities and counties to insure an effective and professional level of law enforcement within the State of California.
21. Third, California Attorney General KAMALA HARRIS has concurrent prosecutorial jurisdiction with the state’s 58 District Attorneys, and as a prosecutor she is bound by a duty to seek substantial justice and avoid the

1 filing of criminal charges in which she knows – or should know – are not
 2 supported by probable cause. *Berger v. United States* (1935) 295 U.S. 78, 88,
 3 55 S.Ct. 629, 633; *United States v. LaPage* (9th Cir. 2000) 231 F.3d 488, 492;
 4 see also ABA Standards for Criminal Justice, Prosecution Function and
 5 Defense Function (3rd Ed. 1993), Prosecution Function Standard 3-1.2(c); and
 6 ABA Model Code, EC 7-13.

- 7 22. Furthermore, HARRIS also has an independent duty to disclose information
 8 beneficial to the accused and by extension she has a duty to prevent wrongful
 9 arrests in the first place when she has the power to do so. *Brady v. State of*
 10 *Maryland* (1963) 373 U.S. 83; *Johnson v. Sup.Ct. (People)* (1975) 15 Cal.3d
 11 248, 124 Cal.Rptr. 32; see also *In re Miranda* (2008) 43 Cal.4th 541, 76
 12 Cal.Rptr.3d 172; ABA Model Rule 3.8(d); ABA Form.Opn. 09-454, along with:
 13 Ca Professional Conduct Rule 5-100, 5-110; and ABA Model Code DR
 14 7-103(A) and ABA Model Rule 3.8(a).
- 15 23. Fourth and finally, the California Department of Justice and the Attorney
 16 General have an equitable duty to clear up the confusion they generated
 17 between 2005 and 2009 as recounted in Hoffman's Declaration.

18 Conclusion

- 19 24. The Motion to Dismiss should be denied.
- 20 25. In the alternative, the Court should deny Defendants' MTD without prejudice
 21 and set a briefing schedule for cross-motions for summary judgment.
- 22 26. In the alternative, the Court should grant Plaintiffs leave to amend in order
 23 to cure any perceived defects in the FAC.

24 Respectfully Submitted on May 20, 2011,

25 /s/

26 Donald E.J. Kilmer, Jr., (SBN: 179986)
 27 LAW OFFICES OF DONALD KILMER

28 Attorney for Plaintiffs